less value. In the case of *Combe* v. *Combe* [2] Denning L.J. explained the decision in the *High Trees case* as follows:—

"Much as I am inclined to favour the principle stated in the *High Trees case*, it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties. That is the way it was put in *Hughes* v. *Metropolitan Railway*, the case in the House of Lords in which the principle was first stated and in *Birmingham, etc., Land Company* v. *London and North-Western Railway Co.*, the case in the Court of Appeal where the principle was enlarged. It is also implicit in all the modern cases in which the principle has been developed. Sometimes it is a plaintiff who is not allowed to insist on his strict legal rights.... On other occasions it is a defendant who is not allowed to insist on his strict legal rights. .....

The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration but only by his word."

In the same case Asquith L.J., at page 225, referring to the *High Trees case* stated:—

"What that case decides is that when a promise is given which (1) is intended to create legal relations, (2) is intended to be acted upon by the promisee, and (3) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it. It does not, as I read it, decide that a promisee can sue on the promise. On the contrary, Denning J. expressly stated the contrary."

As Birkett L.J. said in the same case the doctrine is "one to be used as a shield and not as a sword."

The answer to the first question is therefore that the agreement does *prima facie* afford the defendant a defence to this action.

The plaintiff in his reply is saying that a party cannot in a subsequent proceeding raise a ground of defence which upon the pleadings or the form of the issue was open to him in the former one, and a defendant to a second action by the same plaintiff is estopped from putting on record a plea which is inconsistent with any traversable allegation in the statement of claim in the former action. (*Halsbury's* Laws of England, 3rd Edition, Volume 15, page 186). He says that as the plea which has been raised in this case by the defendant could have been pleaded by the defendant in answer to the claim in Penang High Court Civil Suit No. 116 of 1962 but was not, he cannot put on record this plea in this case because it is inconsistent with a traversable allegation in the statement of claim in that civil suit.

As I have already said the judgment in that civil suit was obtained in default of defence and estoppel based on a default judgment must be very carefully limited. A defendant is only estopped from setting up in a subsequent action a defence which was necessarily and with complete precision decided by a previous judgment. (*New Brunswick Railway Company* v. *British and French Trust Corporation Ltd.* [3]). I do not think it can be said that because the defendant failed to file a defence in Penang High Court Civil Suit No. 116 of 1962 and judgment was given against him in default of defence the defendant's defence in this action was necessarily and with complete precision decided by the previous judgment. As Willes J. said in *Howlett* v. *Tarte* [4] "nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action".

The plaintiff's claim therefore fails and is dismissed.

By reason of faulty pleadings the defendant has rendered the task of everyone in reaching a conclusion in this suit much more difficult and much more prolonged than would have been the case had his pleadings been in order in the first place. Accordingly, except where orders in respect of certain matters in this action have already been made specifically ordering one party to pay the other party's costs, I order that both parties pay their own costs.

Claim dismissed.

Solicitors: *Jag-Jit Singh & Co.; Tan Lye Huat & Co.*

GOVERNMENT OF MALAYSIA & ANOR. v. CHIN KEOW

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) March 2, 1965]

[K.L. — Federal Court Civil Appeal No. 57 of 1964]

Negligence — Standard of reasonable care — Duty of medical practitioner — Powers of court on appeal.

This was an appeal against the decision of the High Court giving judgment for the respondent for damages against the Government of Malaysia and Dr. Devadason for negligence in giving a penicillin injection as a result of which one Chu Wai Lian had died ([1964] M.L.J. 322). The learned trial judge held that there was negligence on the part of the doctor, as he had failed to question the patient as to her sensitivity to penicillin.

Held: as the evidence showed that in the early part of 1960 when the injection was given the potential dangers for penicillin injections were not very widely appreciated by the medical profession in the country and it was not the generally accepted practice among doctors

at the time to make inquiries as to the patient's history in relation to penicillin, it could not be said that the doctor was negligent in not taking precautions before giving the injection.

Per curium: Where there was no question of credibility involved at the trial, the appeal court could form an independent opinion about the case and draw its own inferences from the facts.

Cases referred to:—

(1) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370, 373, 374.

(2) *Mersey Docks and Harbour Board* v. *Procter* [1923] A.C. 253, 258.

(3) *Roe* v. *Minister of Health* [1954] 2 Q.B. 66.

(4) *Marshall* v. *Lindsey County Council* [1935] 1 K.B. 516, 540.

FEDERAL COURT.

Au Ah Wah (Senior Federal Council) for the appellants.

Miss P. G. Lim for the respondent.

Cur. Adv. Vult.

Thomson L.P.: This appeal arises out of a claim under section 7 of the Civil Law Ordinance by the mother and one of the children of Madam Chu Wai Lian who died in Kuala Lumpur on 7th April, 1960.

At the time of her death Madam Chu was 25 years old and for over five years had been employed as an attendant at a Government venereal diseases clinic at Sultan Street. She also worked in the evenings as a ticket seller at an amusement park.

Prior to her death she had a small ulcer on her right ankle and swollen glands and on 7th April, 1960, she consulted Doctor Devadason, the doctor in charge of the clinic where she worked, and he prescribed for her an injection of 2 c.c. of procaine penicillin. This injection was given and almost immediately afterwards she was taken ill and died in a matter of minutes. It is admitted that she died from what is called anaphylactic shock resulting from the injection.

In consequence of this occurrence proceedings for negligence were commenced against the Government of the Federation of Malaya (as it then was) as Doctor Devadason's employer and against Doctor Devadason himself on 19th May, 1962. In the event Ong J. found that negligence on the part of Doctor Devadason was made out and he gave judgment for the plaintiff against both defendants for $9,500 for loss of support and $750 for funeral expenses.

Against that decision the defendants have now appealed.

It is not necessary to set out the grounds of appeal in detail. What they amount to in the sum is that the judge's finding of negligence was not supported by the evidence.

Except on one point, not of very great importance, there was no question of credibility involved at the trial and the case accordingly falls to be considered in the light of the case of *Benmax* v. *Austin Motor Co. Ltd.*[1] In that case Viscount Simonds quoted with approval the following words of Lord Cave L.C. in the case of *Mersey Docks and Harbour Board* v. *Procter*[2]:—

"The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly."

His Lordship continued:—

"I have found, on the one hand, universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge."

The plaintiff in her statement of claim averred a number of particulars of negligence and stated that, if necessary, she would rely on *res ipsa loquitur*. At the trial, however, it is not unfair to say that her case was this. The deceased woman had some sort of so-called allergy to penicillin; if Doctor Devadason had made a proper investigation of her case either by making physical tests or by asking questions he would have discovered this; he failed to make the investigation that a reasonable physician in his position would have made in this connection; his failure to do so was negligent; if he had not been negligent he would have discovered this allergy; if he had discovered this allergy he would not have caused penicillin to be administered as and when he did; and if penicillin had not been so administered then the dead woman would not have died as and when she did. That is the best I can do in the way of setting out the plaintiff's case syllogistically.

The defendants pleaded limitation by reason of section 2(a) of the Public Authorities Protection Ordinance, 1948, and section 38 of the Government Proceedings Ordinance, 1956, in that the action had not been commenced within twelve months after the negligence complained of. This defence, however, was either forgotten or abandoned and at the trial the defence which was relied upon was that negligence was not made out.

The trial commenced on 9th June, 1964, that is more than four years after the event in question. There was really very little controversy as to what actually happened on 7th April, 1960, although, as was to be expected in view of

the period of time that had elapsed, there was a certain lack of correspondence in detail between the two witnesses who gave evidence on the point.

The first of these was one Madam Chan Tet Chin who had been working at the clinic as a nurse since August, 1955, and who knew Madam Chu very well. Her evidence was that on the morning of 7th April, 1960, Madam Chu had an ulcer on her foot and saw Doctor Devadason about it. Doctor Devadason told Madam Chan to give her some "sulphatetrad tablets". There was then some sort of discussion in the course of which Madam Chu said she would prefer an injection and in the event the doctor told the witness to give her an injection of 2 c.c. of procaine penicillin. She did so and almost immediately while she was washing her hands Madam Chu's lips turned blue and she said she felt "funny". The witness put her on a bed and shouted for help. A hospital assistant and Doctor Devadason came; the patient was given injections of adrenalin and coramine but she was not given oxygen because there was no oxygen apparatus available; and in a few minutes she died.

Doctor Devadason's evidence was that he was a Government medical officer and in 1958 was posted to the clinic where he found the nurse Madam Chan and the deceased woman among the staff. On 7th April, 1960, Madam Chan brought Madam Chu to him. She had an ulcer on her right ankle and swollen glands. He examined her but did not make any "investigation into her history" because, he said, "The staff nurse had told me about her". In particular he said the staff nurse told him that she had given the deceased penicillin some years before. He prescribed sulphatetrad tablets or alternatively a penicillin injection. The staff nurse came back shortly afterwards and said that the deceased preferred the penicillin and such an injection was given by a hospital assistant. Shortly after he was called and found the deceased woman collapsed and lying on a couch. He did what he could for her, but after a few minutes she died.

The trial judge was very critical of the evidence of these two witnesses. He took the view that their evidence as to the deceased woman expressing a preference for penicillin rather than sulphatetrad tablets was a concoction because: "there was no other way to pass the blame on to the deceased except to allege that the prescription was in the alternative and that the unfortunate woman herself made the choice". In the event he believed neither of them.

The judge's views were based on the fact that both witnesses apparently gave their evidence in a somewhat confused way and that in any event he considered there was a strong element of inherent improbability in what they said. That may well be. It is, however, abundantly clear that at the very lowest there was no collusion between them because clearly the nurse, who in any event was the plaintiff's witness, if she had been concerned to concoct a false story in collaboration with Doctor Devadason to shield herself would almost certainly have adopted Doctor Devadason's evidence that it was the hospital assistant and not herself who actually administered the injection. And if there was no collaboration between the two witnesses it is inconceivable that independently and without consultation they should both have invented the story about the sulphatetrad tablets. The only reasonable explanation, then, of their telling that story is that it is true, and the confusion in the details of their evidence was due to the fact that they were searching their memories as to something that happened four years previously. In any event, however, whatever the truth of that story be it is not really very material except that the confusion regarding it may to some extent have accounted for the feeling that something was being hushed up which seems to have found its way into the case.

Before departing from this portion of the evidence it is to be observed that the judge has stated no opinion regarding one important point on which Doctor Devadason's evidence was in conflict with that of the nurse. He said that she had told him that she had previously given the deceased woman penicillin. But the nurse's evidence was that though she had in fact given the deceased woman a penicillin injection in September, 1955, on the instructions of another doctor, she did not tell this to Doctor Devadason on 7th April.

It is also to be observed that neither side invited Doctor Devadason to say just what conversation, if any, took place between him and the dead woman.

So much, or so little, for what actually happened at the clinic on 7th April, 1960. Whether it makes out negligence on the part of Doctor Devadason is something to be considered in the light of the rest of the evidence.

Throughout the case the words "allergy" and "anaphylaxis" have been freely used and I am not at all sure that I know what these words mean. There was, however, evidence that at different times the deceased woman behaved in different ways when she received injections of penicillin which goes to make out what I think is meant by an allergy on her part.

First of all Madam Chan, the nurse, said

she had given her an injection of procaine penicillin on the instructions of a doctor who had prescribed it for a sore throat and observed no unusual reactions. This was in September, 1955.

Then Madam Chin, the mother, said that some four years before her death her daughter had an injection of penicillin and suffered afterwards from swelling of the face and body and itching all over. The mother said she sent her back to see the doctor and she came back and said she had been warned not to use penicillin in future. That was said to have taken place in the General Hospital in Kuala Lumpur and in support of her evidence the mother produced an out-patient treatment card which she had found in her daughter's drawer after her death. This was dated April, 1958, and bore the name of the dead woman and suggested she had been treated for earache. The words "allergic to penicillin" were legibly written on the card. The doctor who had treated the deceased on this occasion was not called as a witness. It is reasonable, however, to suppose that the card relates to the same incident as was described by the mother.

Finally there is the evidence of what happened on 7th April, 1960, when the dead woman received an injection of procaine penicillin and almost immediately died.

For the purposes of these proceedings it has been admitted that the penicillin injection was the cause of death. That is not in any way in question. It is, however, to be observed, for it has a bearing on another aspect of the case, that from the point of view of strict logic the causation was not proved. The body was examined shortly after death by a doctor who was not called as a witness but whose written report on his examination was admitted. According to this he made a thorough examination of the internal organs and apart from a slight congestion in the lungs found nothing abnormal. His conclusion was as follows:—

"Patient had an injection of penicillin and died one minute later and in view of negative findings at post-mortem—

Cause of death — Anaphylactic shock."

I am not being critical in any way and in particular I would not wish to question in any way this doctor's knowledge or competence or the thoroughness of his examination. What in effect, however, he said is this: I found nothing wrong with the woman except that she was dead; she had had penicillin immediately before she died and therefore I am compelled to conclude that the penicillin was the cause of death. In other words *post hoc, ergo propter hoc.* That is not an academic criticism for it suggests that this particular doctor in April, 1960, may not have been very familiar with the behaviour of the human body when injected with penicillin and this has, of course, a bearing on the contemporary general state of knowledge among medical men which to my mind is the most important element in the case.

I pass now to the other medical evidence and would observe *in limine* that this was a case where it was necessary to evaluate the conduct of a professional man in the practice of his profession. For that purpose it was necessary to consider matters far beyond the knowledge and experience of even an educated layman and in particular the nature and properties of a powerful drug which in its modern form had only of recent years come to the notice of medical science. In the circumstances it was essential, if justice was to be done, that the judge should receive every possible assistance from the parties in the way of professional evidence. Unfortunately the assistance he received was something less than adequate.

In the case of *Roe* v. *Minister of Health* [3] the court had the benefit of the evidence of a number of medical witnesses "of the highest professional standing" (*per* McNair J. at p. 68), of the "greatest specialists in the land" (*per* Denning L.J. at p. 82).

Moreover it is usual in such cases to make copious references to the writings of distinguished medical men.

Here the judge received no such assistance. The medical witnesses who were called were few in number and, though there can be no doubt as to their individual eminence, they were not invited to state their views in more than a very cursory way. Again, with one exception so vague as to be valueless, no reference was made to any written work of authority.

First, a Doctor Tan, a licentiate of the Singapore Medical School who had been in private practice for about twelve years, was called for the plaintiff. He said he had given a large number of penicillin injections. When he thought the use of penicillin was indicated he would take a careful history, he would ask questions as to previous treatment with penicillin and as to whether it had produced such symptoms as shortness of breath, itching or fainting. If a patient had had penicillin before there was always present the possibility that he might have developed an abnormal sensitivity to the drug. If, therefore, there was a history of a previous injection then irrespective of whether there had been unusual reactions he would cause his staff to carry out certain tests, the nature of which he did not describe in any great detail but which apparently consisted in scratching the skin and rubbing in a little penicillin and then giving a very small injection

under the skin. He considered such precautions were necessary because "penicillin has proved fatal in quite a number of cases", but he did not say whether these cases were within his own knowledge or whether he had read about them in books. His only reference to any published work was a statement that a Mr. McGladdery, who I assume to be a local surgeon of that name, "wrote on penicillin poisoning in December, 1960". This publication was not produced for the benefit of the judge nor was it read. In cross-examination the only question he was asked as to physical tests elicited the very sapient reply that "no test is infallible".

Then there was a Doctor Rajahram, the president of the Medical Association of Malaya who was also called for the plaintiff. He was not invited by anybody to state any views about anything but he produced a letter he had written on 22nd December, 1960, to the assistant secretary of the British Medical Association and the reply he received from that functionary.

This letter by the head of the local professional organisation is to my mind of the greatest importance as illuminating the state of knowledge of medical practitioners in Malaya at the time when it was written for it is difficult to think of any reason for its being written if the answers to the questions which it raised were known. In it the writer asked for the views of the British Medical Association on the subject of penicillin sensitivity and asked six questions. The first two of these were as follows:—

"(a) Should inquiry be made of previous penicillin injections and of any reactions to these?

(b) Should inquiry be made of history of eczema, urticaria, asthma and other allergic manifestations?"

The other questions related to what if any tests should be performed before giving penicillin injections.

The answer is not of any evidentiary value for it merely sets out the effect of advice that the writer has had from an expert or experts whom he does not name. For what it is worth, however, the answer to the two questions which have been quoted is in the affirmative and the remainder deals with the question of physical tests none of which are said to be wholly reliable.

Only one professional witness was called for the defence. He was a Doctor Pillay, the consultant physician to the General Hospital, Kuala Lumpur. His evidence was very brief. He said opinions as to physical tests were divided and in his opinion they were not valuable, though in 1964 he would carry them out rather than dispense with them. He said there had been twelve cases in Taiwan where death resulted from penicillin injections but he did not say, and apparently was not asked, when these cases came to his knowledge. As regards Doctor Devadason's conduct in relation to Madam Chu, he said that Doctor Devadason did his best "within his limited means" but that the history of the patient should have been taken. There is no record of any cross-examination of this witness but as according to the associate's diary his evidence, that of Doctor Devadason himself, the closing addresses of counsel and any observations the judge may have made when giving judgment only occupied an hour his cross-examination cannot have been very lengthy.

Finally there was the evidence of Doctor Devadason himself. He was aged 50 and was a licentiate of the Singapore Medical School and had been a Government medical officer for 25 years. He had been posted to the clinic at Sultan Street, which was a clinic for the treatment of venereal diseases, since 1958 and the average number of injections of penicillin given there was 100 a day. This figure sounds large to a layman but it finds support in the evidence of the nurse who said she herself gave 50 to 60 such injections a day and in any event it was apparently accepted by the plaintiff for the witness was not cross-examined on it. Prior to the death of Madam Chu he did not use physical tests prior to ordering penicillin injections because it was not the practice to give such tests in government institutions and, although he had no opinions on the subject himself, he knew that opinions were divided as to the value of tests which, however, since the present unfortunate fatality had become a matter of routine. In cross-examination he very candidly admitted that he knew there was a possibility of a person developing a "hypersensitivity" to penicillin after having had it and in such cases there was a possibility of danger which he regarded as remote but he himself had had no "mishaps" before this particular case.

Now, it is not as clear as it might be just what the plaintiff's case was in the sense that it is not very clear on which alleged acts or omissions she was relying to make out Doctor Devadason's negligence. From the many references to physical tests in the evidence it would seem to be at the lowest possible that the plaintiff was relying at least to some extent on Doctor Devadason's omission to make such tests and the difficulty here is only increased by the fact that at the close of the case counsel for the plaintiff did not address the court or, if she did, no note has been supplied to us of what she said.

The judge, however, would seem to have been under no misapprehension in this regard. After demolishing the evidence of the nurse and the second defendant he dealt with the defence by saying that what the second defendant "sought to explain away" was his failure to carry out

physical sensitivity tests although Doctor Pillay doubted whether such tests were reliable. But, he went on:—

"What the defence appeared to have been unable to appreciate was that I was not in the least concerned with the doctor's failure to carry out sensitivity tests. The negligence did not lie in the omission to carry out such tests on the patient for individual idiosyncracy. The essence of the negligence here was the failure to take the simple, elementary precaution of asking a few questions. Had he done so, the mishap would not have happened."

With great respect I do not see how the learned judge could have arrived at these conclusions without importing into the case a great deal of personal knowledge and indeed he prefaced this part of his observations by saying:—

"Although the discovery of penicillin by Sir Alexander Fleming was made thirty-five years ago, its general use in this country has now gone on for nearly 20 years, and it is, I think, true to say that many an ordinary layman is aware that certain individuals are allergic and sensitive to this particular antibiotic, and that in certain cases its use had had fatal consequences."

Now, I do not say for a moment that this is wrong; for all I know the subject of penicillin allergy may be a daily topic of conversation on the Petaling Jaya omnibus or among the patients at the Sultan Street clinic. What I do say is that for myself I was completely ignorant of anything of the sort until I had to apply my mind to this appeal.

The state of my own knowledge is, of course, irrelevant as is the state of knowledge among laymen generally. What is relevant and what is important is the question what was the general state of knowledge on the subject among members of the medical profession in Malaya in 1960.

The witnesses were all speaking in the middle of 1964, and there is nothing to shew that their attention was directed to conditions as they were in the early part of 1960 and not at the time they were speaking. Doctor Tan said penicillin had proved fatal in quite a number of cases but he did not say when these cases came to his knowledge and the only publication on the subject he mentioned was in December, 1960. Doctor Pillay mentioned 12 unfortunate inhabitants of Taiwan who had died apparently by reason of being given penicillin but again he did not say when this came to his knowledge.

On the other hand on 22nd December, 1960, that is some months after the fatality with which we are concerned here, Doctor Rajahram, the president of the Malayan Medical Association was writing on behalf of his association the letter which has already been quoted which at the very lowest suggests there was doubt in the minds of the medical profession as to the desirability of ascertaining any history of previous penicillin injections. Why ask the question if the answer was as certain and well known as it apparently was four years later? Unfortunately, however, the significance of this letter would appear not to have been appreciated at the trial for neither counsel took the trouble even to ask the writer why he wrote it and it was not urged upon the judge's notice at the end of the trial. It is accordingly perhaps not surprising that it was overlooked.

In all the circumstances and particularly in the light of Doctor Rajahram's letter it is very difficult to avoid the conclusion that in the early part of 1960 the potential dangers from penicillin injections was not very widely appreciated by the medical profession in this country and that it was not the generally accepted practice among doctors at that time to make enquiries as to a patient's history in relation to penicillin.

It is in the light of this that the present case must be considered. Doctor Devadason was engaged in a line of professional business where he was giving literally thousands of penicillin injections a year. Presumably he had far more experience of giving such injections than Doctor Tan and Doctor Pillay put together. He had had no trouble before. The woman whom he treated was not a stranger. She had been living in an atmosphere, so to speak, of penicillin injections for years and it may well be that the fact that she herself had suffered some discomfort from having such an injection some years previously had not shaken her belief in the efficacy of the drug. In the circumstances there seems nothing very surprising in her asking for an injection of it or in Doctor Devadason giving her such an injection. And if he did not know at the time he was doing something potentially dangerous there can be no question of negligence by reason of not taking precautions which at the time were not by reason of any potential danger considered necessary. As was said by Maugham L.J. in the case of *Marshall* v. *Lindsey County Council*:—[4]

"An act cannot, in my opinion, be held to be due to a want of reasonable care if it is in accordance with the general practice of mankind. What is reasonable in a world not wholly composed of wise men and women must depend on what people presumed to be reasonable constantly do. Many illustrations might be given and I will take one from the evidence given in this action. A jury could not, in my opinion, properly hold it to be negligent in a doctor or a midwife to perform his or her duties in a confinement without mask and gloves, even though some experts gave evidence that in their opinion that was a wise precaution. Such an omission may become negligent if, and only if, at some future date it becomes the general custom to take such a precaution among skilled practitioners."

In the case of *Roe* v. *Minister of Health*, *supra*, Denning L.J. said this (at p. 83):—

"It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially

in cases against hospitals and doctors. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way. Something goes wrong and shows up a weakness, and then it is put right. That is just what happened here."

That may not be a very profound statement of law. It does, however, contain a very great deal of very profound sense and to my mind it can and should be applied in the present case.

For myself I would allow the appeal.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal allowed.

ONG HOO HONG v. KOK YIN WENG

[O.C.J. (Hepworth J.) March 12, 1965]

[Penang — Civil Suit No. 326 of 1963]

Trespass — Action by one co-owner to oust other co-owner — Circumstances under which an action for trespass will lie.

Land — Co-owner — When co-owner can bring action for trespass.

The plaintiff who was the legal owner of a 24/80th undivided share in the premises No. 330-A Chulia Street, Penang, claimed against the defendant for recovery of possession of the said undivided share and for damages for trespass. The defendant was the legal owner of a 56/80th undivided share in the premises as trustee for the Phun Yue Wooi Koon Association, which had gone into occupation of the premises.

Held: one co-owner of land can only bring an action of trespass against the other if he has been actually ousted, or dispossessed of the land and as in this case there was no evidence that the plaintiff had attempted to enter into occupation of the premises or any part thereof, or that he had been excluded or prevented from entering the premises, his claim must fail.

Cases referred to:—

(1) *Murray* v. *Hall* 137 E.R. 175.

(2) *Jacobs* v. *Seward* (1872) L.R. 5 H.L. 464.

CIVIL SUIT.

Ong Huck Lim for the plaintiff.

O. L. Phipps for the defendant.

Cur. Adv. Vult.

Hepworth J.: The plaintiff is the legal owner of a 24/80th undivided share in land known as Lot 228(1), Town Subdivision 19, North East District of Penang, together with the premises No. 330-A Chulia Street, Penang, erected thereon (hereinafter referred to as the said premises).

The defendant is the president of Phun Yue Wooi Koon, a registered association (hereinafter referred to as the association), and is sued as such. The defendant is the legal owner of a 56/80th undivided share in the said premises as trustee for the association.

The defendant, as trustee for the association, purchased a 14/80th undivided share in the said premises on the 7th October, 1961, a further 14/80th undivided share on the 14th October, 1961, a further 7/80th undivided share on the same date, the 14th October, 1961, a further 14/80th undivided share on the 23rd October, 1961, and a further 7/80th undivided share on the 27th November, 1961.

The plaintiff purchased his 24/80th undivided share in the said premises on the 9th February, 1962.

The association went into occupation of the said premises in August, 1963, without reference to the plaintiff. At that time the said premises were vacant and unoccupied.

On or about the month of September, 1963, the defendant carried out repairs to the said premises with the permission of the City Council, Penang. These repairs were repairs which the City Council by nuisance notice No. 561 dated the 19th November, 1960, to the then owners of the said premises had required to be done. During the carrying out of these repairs certain unauthorised alterations or additions were made without the defendant's or the association's knowledge or consent, with the result that the city architect and building surveyor issued a notice to cease work on the repairs forthwith.

Thereupon the plaintiff through his solicitors issued a notice dated the 21st October, 1963, addressed to the association requesting and requiring the association to quit and deliver up peaceable vacant possession of his 24/80th undivided share of and in the said premises within 2 weeks on the ground that the association were trespassing therein and were in unlawful occupation thereof in so far as his share was concerned.

The association failed and still fails to comply with the said notice.

The plaintiff therefore claims against the defendant for recovery of possession of the plaintiff's 24/80th undivided share of and in the said premises, and for damages for wrongfully entering and occupying the plaintiff's said share in the said premises.

The defendant denies that the association are in wrongful occupation of the said premises as a trespasser or at all. The defendant pleads that the occupation of the said premises by the association is an exercise by the association of their rights as beneficial and equitable owners of the said 56/80th undivided share in the said premises. Alternatively the defendant pleads